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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 40

GILBERTVILLE TRUCKING CO., INC., THE L. NELSON & SONS TRANSPORTATION COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLEES

OPINIONS BELOW

The opinion of the district court is reported at 196 F. Supp. 351 (R. 108–126; J.S. App. 2–23). The opinion of the Interstate Commerce Commission (R. 11–24; Motion App. 17b–33b) is reported at 80 M.C.C. 257; the opinion of Division 4 (R. 81–93; Motion App. 1b–16b) is reported at 75 M.C.C. 45; the opinion of the Examiner (R. 30–80; J.S. App. 24–81) is unreported.

JURISDICTION

The judgment of the district court was entered on July 18, 1961. A timely notice of appeal was filed

on September 11, 1961, and this Court noted probable jurisdiction on February 19, 1962 (R. 688). The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b). See *McLean Trucking Co.* v. *United States*, 321 U.S. 67.

QUESTIONS PRESENTED

1. Whether the Commission's finding that appellants violated Section 5(4) of the Interstate Commerce Act by the unlawful common control of Nelson Co. and Gilbertville Co., was supported by adequate subsidiary findings and substantial evidence.

2. Whether the decision of the district court, upholding the Commission's finding of violation of Section 5(4), was vitiated by alleged differences between the factual statements and rationale of the court and Commission.

3. Whether, after finding the stated violation of Section 5(4), the Commission acted within its statutory discretion,

(a) in denying appellants' application to merge Nelson Co. and Gilbertville Co.;

(b) in directing appellants to divest themselves of their interests in Gilbertville Co.

STATUTES INVOLVED

The relevant portions of the National Transportation Policy, 54 Stat. 899, and of Sections 1 and 5 of the Interstate Commerce Act, as amended, 49 U.S.C. 1, 5, are set forth in the appendix, *infra*, pp. 61–66.

STATEMENT

This is a direct appeal from a final judgment entered on July 18, 1961, by a three-judge district

court dismissing appellants' suit to set aside orders of the Interstate Commerce Commission. Under Section 5 of the Interstate Commerce Act, 49 U.S.C. 5, the Commission denied an application to merge the Nelson and Gilbertville Cos. and directed appellants to divest themselves of their interests in Gilbertville Trucking Co. The following statement is based on facts found by the hearing examiner. Both the full Commission and its Division 4[1] pointed out that these findings of fact were not challenged by appellants (R. 19, 85, 89).

A. THE MERGING COMPANIES

1. Appellant L. Nelson & Sons Transportation Company ("Nelson Co.") is a common carrier by motor vehicle, authorized by the Commission to transport specified commodities associated with the manufacture of cloth by irregular routes between certain points in New England and between certain other points in New England, New York, New Jersey and Pennsylvania (R. 39–40). It was organized in 1930 as a partnership of Mrs. Nelson and two of her seven children—Oscar and Charles Chilberg (R. 36–37, 387).[2] After the incorporation of Nelson Co. in 1948,

[1] Pursuant to Section 17(2) of the Act, the Commission has delegated to one of its divisions the responsibility for deciding all matters dealing with mergers and acquisitions of control arising under Section 5 of the Act. Up to March 6, 1961, the responsible division was designated Division 4, since that time Division 3. 26 Fed. Reg. 1964, 1967.

[2] Mrs Nelson had married twice and her seven children were Charles C. Chilberg, Oscar H. Chilberg, Howard Chilberg, Kenneth A. H. Nelson, Clifford J. O. Nelson and two daughters, Greta C. Nelson Carlson and Ruth Nelson Widham Nyberg (R. 36).

stock ownership was divided among Mrs. Nelson and four sons—Charles and Oscar Chilberg and their half-brothers, Clifford and Kenneth Nelson. Mrs. Nelson served as president and treasurer, Oscar Chilberg as vice-president, Kenneth Nelson as assistant treasurer, and Clifford Nelson as secretary (R. 37).

At the time of the hearing in this case, the stockholders in Nelson Co. were Charles Chilberg (president and treasurer) and Clifford Nelson (secretary), each owning 226 shares, and one of their sisters, Greta Nelson Carlson, owning 42 shares. Mrs. Nelson had died in 1950 and other members of the family had sold their interests to Charles Chilberg and Clifford Nelson. Kenneth Nelson sold his stock in Nelson Co. to Clifford Nelson on September 22, 1951, and on that date he also contracted to sell to Clifford the shares due him under his mother's will and resigned as an officer and director of the company (R. 37).

Pursuant to Commission approval in 1956, Charles Chilberg and Clifford Nelson, the principal stockholders in Nelson Co., acquired R. A. Byrnes, Inc. (R. 37), a motor common carrier authorized to carry general commodities over irregular routes between New York City and certain points in New Jersey, Pennsylvania, the District of Columbia, Maryland and Virginia, as well as between certain points in New Jersey and points in the latter states and the District of Columbia (R. 40).[3] Earlier, in 1953, the

[3] See *Charles G. Chilberg and Clifford J. O. Nelson—Control—R. A. Byrnes, Inc.*, MC F-5749, unreported decision by Division 4, May 15, 1956. Byrnes is also authorized to carry

Commission had denied the applications of Nelson Co. and its stockholders to acquire another common carrier with authority to transport general commodities over irregular routes between points in New Jersey and other points in New Jersey, New York, Connecticut and Pennsylvania. *L. Nelson & Sons Transp. Co.—Purchase—White's Exp.*, 59 M.C.C. 675.

2. Appellant Gilbertville Trucking Co., Inc. ("Gilbertville Co."), is a motor common carrier, authorized to carry general commodities over regular and irregular routes within Massachusetts and over irregular routes between certain points in New York, New Jersey, Connecticut and Rhode Island, and to carry specified commodities over some regular and some irregular routes between certain points in New England, New York, New Jersey and Delaware (R. 40–41).

Gilbertville Co. was incorporated in Massachusetts in 1940 with its principal place of business at Gilbertville, Massachusetts, and was solely owned by one Wilfred Vachon (R. 38). On March 1, 1953, Kenneth Nelson assumed control of Gilbertville, and began to operate it (R. 65–66), pursuant to an agreement to purchase the entire stock of the company.[4]

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specified commodities between certain points in Maryland, Pennsylvania, Delaware, New Jersey and the District of Columbia (R. 40). The acquisition of Byrnes was approved with the understanding that it would be merged into Nelson Co. after certain tax advantages were obtained (R. 67).

[4] The contract was executed one day later, on March 2, 1953 (R. 38), and the stock certificates delivered in July 1953 (R. 211, 229–230, 308). The examiner's finding that Kenneth Nel-

While some shares are now in the names of his wife and of the firm's terminal manager, Kenneth Nelson is the sole beneficial owner of the stock of Gilbertville (R. 38–39).

The service of Gilbertville was enlarged by the purchase in 1954, with Commission approval (R. 686–688), of the operating rights of Lewis Marmer, doing business as Wolff's Express (R. 41–42, 66). It thus acquired common carrier authority to transport in interstate commerce general commodities over 17 regular routes between Lowell, Massachusetts, and Boston, Massachusetts, serving certain intermediate and off-route points, and over irregular routes between other points in Massachusetts (R. 41, 42).[5]

B. RELATIONSHIPS BETWEEN KENNETH NELSON, NELSON CO. AND GILBERTVILLE CO.

1. As above stated, Kenneth Nelson was an officer, director and stockholder of Nelson Co. until September 22, 1951, when he sold his stock to his brother and resigned his corporate offices. Thereafter, he continued to occupy office space in Nelson's headquarters at Rockville-Ellington, Connecticut, where he was em-

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son actually took control of the company on March 1, 1953, is clearly established. R. 212–213, 224.

[5] Since at that time Wolff's Express and Gilbertville Co. together operated less than 20 motor vehicles, the acquisition was not considered under Section 5, but under regulations promulgated under Section 212(b) of the Interstate Commerce Act, 49 U.S.C. 312(b).

ployed by Nelson as a so-called "free-lance" tariff consultant; Nelson Co. was his only client and it paid him over $15,000 in 1952 and over $13,000 in 1953 (R. 65).

In January 1953, while still consultant for Nelson Co., Kenneth Nelson became interested in and discussed the purchase of Gilbertville Co. (R. 65). He took control of Gilbertville Co. on March 1, 1953, *supra*, p. 5. Part of Kenneth Nelson's "continued employment" by Nelson Co. in 1953 was "concurrently with his management and operation of Gilbertville [Co.]" beginning March 1, 1953 (R. 61). Since Gil-

[6] The term "free lance" was put in quotation marks by the examiner (R. 45, 65), Division 4 (R. 90), and the Commission (R. 191). Each accompanied the words "free lance" with statements contradicting Kenneth Nelson's alleged independence; and it seems clear that the quoted term was used to indicate the absurdity of the contention that Kenneth Nelson was an independent contractor when he was employed solely by Nelson Co., not as a finding in appellants' favor as they assume (Br. pp. 24–25). In quoting "free lance," the examiner, Division 4 and the Commission were citing the testimony of Solomon, the accountant and long-time financial advisor of the Nelsons, Chilbergs and their companies, who stated that Kenneth Nelson was a "free-lance tariff consultant" (R. 243, 276) but admitted that "all" of Kenneth Nelson's income as tariff consultant came from Nelson Co. (R. 358–360).

[7] The examiner's finding that Kenneth Nelson worked for Nelson Co. after taking over Gilbertville Co. is clearly required by the testimony at R. 361, on cross-examination, of appellants' witness Solomon, the accountant and long-time financial advisor of the Nelsons, Chilbergs and their companies, who advised Kenneth Nelson on his purchase of Gilbertville Co. (R. 65). Appellants (Brief, p. 25, fn. 15) seek to discredit this

bertville Co. recorded administrative and general expenditures of only $4,389.37 in 1953 (R. 45, 166), "a reasonable inference may be drawn that Kenneth received little or nothing as salary in that year, and, consequently, that his 'earnings' of over $13,000 as tariff consultant to Nelson were in the nature of a subsidy to Gilbertville" (R. 66).

2. After the purchase by Kenneth Nelson, Gilbertville Co.'s headquarters were relocated in the building at Rockville-Ellington, Connecticut, which is the headquarters of Nelson Co. and Byrnes (R. 43). Gilbertville Co. uses five terminals. Four of them, at Rockville-Ellington, Newton (Massachusetts), Woonsocket (Rhode Island), and Long Island City, New York, are shared with Nelson Co. under a sublease from Nelson Co.; the other is at Gilbertville, Mass-

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witness as only "guess[ing]" without identifying him as their own. They also assert that the witness's use of a conditional verb indicates doubt; in answer to the examiner, he stated (R. 361) that some of Kenneth Nelson's services as tariff consultant for Nelson Co. for which he was paid in 1953 "would have to be after" his acquisition of Gilbertville. But this witness habitually used the conditional when he intended a simple affirmative or negative. On several other occasions, he corrected himself after prompting by counsel and the examiner, *e.g.* (R. 285, 286–287).

Division 4 expressly affirmed this finding of the examiner (R. 90). The full Commission referred to Kenneth Nelson's maintaining an office "from September 1, 1951 to March 1, 1953" at a Nelson terminal where he served as tariff consultant (R. 19). But the Commission nowhere indicates its rejection of the prior findings. Since the accountant's testimony is uncontradicted, and there is no evidence whatever supporting a cut-off date of March 1, we believe the Commission's statement was an inadvertent error.

achusetts (R. 43–44, 46–47).[7] At least 25 percent of the repairs on Gilbertville Co.'s equipment are made by Nelson Co.'s mechanics at the Rockville-Ellington terminal (R. 48). At the four shared terminals and in various other cities served by the carriers, Nelson Co. and Gilbertville Co. have the same telephone listing (R. 47), and they share the use of leased telephone lines (R. 43).

At the time of its acquisition by Kenneth Nelson, in March 1953, Gilbertville Co. owned one truck, three tractors and four trailers (R. 44) and its books showed a deficit of $39,868 (R. 66). By July 31, 1956, it had increased its equipment stock to 15 trucks, 12 tractors and eight trailers (R. 44). This resulted in part from purchases of used equipment from Nelson Co. (R. 47).[8] Gilbertville Co.'s operating revenues increased from $75,489 in 1953 to $423,237 in 1955, as com-

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[7] The terminals at Rockville-Ellington, Newton and Woonsocket are leased by Nelson Co. from The Bergson Company, which is a real estate holding company, the stock in which is owned equally by each of the seven children of Mrs. Nelson (R. 39, 43). Besides the four terminals it shares with Gilbertville Co., Nelson Co. has another terminal in Philadelphia, Pa. (R. 43).

Gilbertville Co.'s terminal manager at Gilbertville, Massachusetts, had been an employee of Nelson Co. for 15 years before being employed by Kenneth Nelson (R. 45).

[8] The initial poor standing of Gilbertville Co. and its early acquisitions of equipment caused its financial situation to become "precarious" in early 1954, in the opinion of Kenneth Nelson's accountant (R. 66). This situation led to consideration of merging Gilbertville Co. and Nelson Co. (R. 66), which was suspended while arrangements were made for two other acquisitions—by Gilbertville Co. of the operating rights of Wolff's Express (p. 6, *supra*), and by Nelson Co. of R. A. Byrnes, Inc. (p. 4, *supra*) (R. 66–67).

pared with Nelson Co.'s increase from $895,774 to $924,607 over the same period (R. 68). On November 8, 1955, Nelson Co. owed Gilbertville Co. over $39,000 for interline settlements, an accumulation for the three years 1953–55, and Gilbertville Co. owed Nelson Co. approximately $19,000 in equipment rentals (R. 48, 49), indicating that "[t]hey are extremely liberal one with the other with respect to debit balances" (R. 59). The hearing examiner stated that "it may reasonably be inferred from the phenomenal growth in its [Gilbertville Co.'s] revenues that Charles Chilberg and Clifford Nelson and other members of the Chilberg-Nelson family extended a helping hand to Gilbertville in the development of its custom" (R. 68).

In addition to the purchased equipment, Gilbertville Co. regularly utilizes in its service vehicles leased from Nelson Co. (R. 44). It usually has about three trucks and two or three tractors on lease from Nelson Co. for terms of 30 days or more, and leases each day from Nelson Co. from one to six more tractor-trailer units and several trailers on a trip basis (R. 47). To facilitate such leasing, printed form leases are used and Gilbertville Co. keeps lists of vehicles owned by Nelson Co., described by make, type, registration and serial number (R. 47). Gilbertville Co. also maintains a complete file of doctor's certificates for all of Nelson Co.'s drivers and on numerous occasions the same driver is employed by both Gilbertville Co. and Nelson Co. during the same payroll period or even the same day (R. 48). When one of the companies handles a shipment destined for a point

on the lines of the other, the interchange of traffic is often accompanied by an "interchange" of equipment—that is, the vehicle carrying the shipment is leased at the interchange point from the initial carrier by the destination carrier, which also employs the same driver, thus permitting an uninterrupted through movement of the shipment (R. 48, 68).

Gilbertville Co. interchanges traffic amounting to approximately 5 percent of its total revenue with Nelson Co. and another 4 or 5 percent with Byrnes (R. 48).[10] It receives a flat 40 percent on all traffic interlined with Nelson Co., regardless of the length of their respective hauls (R. 48–49). Nelson Co. also does all of the billing on shipments interlined with Gilbertville, whether the shipment is prepaid or collect and regardless of which carrier makes delivery (R. 49). On various occasions, Commission employees observed instances in which freight of one carrier (*i.e.*, delivered to it and moving under its bill) was being transported by the other, indicating a practice by Nelson and Gilbertville Cos. "of commingling or pooling their shipments to suit their convenience" (R. 49).

The relations between the two companies came under the scrutiny of employees of the Interstate Commerce Commission who visited the offices of Nelson Co. at Rockville-Ellington, Connecticut, in November 1954 and "observed Kenneth [Nelson] engaged in activities believed to be in furtherance of

[10] In addition, a substantial portion ("no more than 15 percent") of Gilbertville's traffic "could reasonably or lawfully have been transported by Nelson [Co.]" (R. 68).

Nelson [Co.'s] business" (R. 45).[11] Subsequent inspections were made by Commission agents in November 1954 and November 1955, at the terminal at Newton, Massachusetts, occupied jointly by Gilbertville Co. and Nelson Co. (R. 45–46), and were described at the hearing.

C. PROCEEDINGS BEFORE THE COMMISSION

On October 6, 1955 Nelson and Gilbertville Cos. filed an application in ICC Docket No. MC–F–6099 for authority under Section 5 of the Interstate Commerce Act for Nelson Co. to acquire control of Gilbertville Co. by purchase of its stock and to merge Gilbertville's operating rights and property with Nelson Co.; Charles Chilberg and Clifford Nelson also applied for authority to acquire such control (R. 31, 131–181). On December 20, 1955 a formal order was issued by the Commission in No. MC–F–6178 instituting an investigation under Section 5(7) of the Interstate Commerce Act into possible violations of Section 5(4) by operation of Gilbertville Co. and Nelson Co. in a common interest (R. 31, 181–182). The order named as

[11] The ICC inspector testified that the second-floor room labeled as the Gilbertville Co. office was not occupied (R. 533). Kenneth Nelson was in the first-floor quarters of Nelson Co. and Byrnes, where he operated the teletype, answered the telephone, gave orders to two Nelson Co. employees (R. 532–533) and to others on the intercom (R. 530). He also refused to produce a Nelson Co. teletype message, telling the inspector he had destroyed it (R. 531, 537). The inspector further stated that he asked Clifford Nelson, upon the latter's arrival at the terminal later the same day, how it was that Kenneth Nelson happened to be directing Nelson Co.'s business, and Clifford Nelson "could offer no explanation" (R. 537–538).

respondents the two companies and their stockholders and also provided for a consolidated hearing on the investigation proceeding and the application for approval of the merger (R. 31, 182).

In his proposed report, the hearing examiner set forth the factual findings summarized above. He also noted the prior acquisitions by Nelson and Gilbertville Cos. and observed that the merger would provide, by combination of the Gilbertville and Byrnes operating rights, a through general commodity service between Massachusetts, Rhode Island and Connecticut as far south as the District of Columbia, and would also enable Nelson to transport its narrow range of commodities throughout the area of Gilbertville's general commodity authority (R. 67). The examiner found the evidence "persuasive that an overall plan or project to create a larger and more significant motor carrier in the New England-Middle Atlantic area using Nelson as a nucleus was conceived and followed" (R. 68–69), either before the purchase of Gilbertville or at the latest in April or May of 1954 (R. 69). "At any rate, events and the interrelations of the respondent carriers following the purchase of Gilbertville mark their operation as that of a unified organization" (R. 69). The examiner concluded that "the acts, practices and arrangements" described, together with the acquisitions by Nelson Co. and Gilbertville Co., and "the circumstances surrounding them, require a finding that control and management in a substantial degree of Nelson and Gilbertville in the common interest of Nelson and its shareholders and of Gilbertville and its shareholders have been

accomplished or effectuated and presumably are being maintained" (R. 70).

On the ground, however, that this illegal control and other violations of Commission regulations appeared to result from "ignorance" and "a degree of carelessness" rather than "wilfulness", the examiner stated that "[a] finding of unfitness by reason of violations is not warranted" (R. 72–73). Arguments by intervenors that the proposed merger would constitute a new service, with an adverse effect on existing carriers were rejected by the examiner on the ground that "the competition which is feared is either already an accomplished fact or capable of becoming so even though the present application is denied", since Gilbertville Co. could continue its present operations and interchanges with Byrnes (R. 74–75). The examiner also found that unification of the carriers would result in "substantial * * * savings" in operating costs and an improvement in the transportation service "presently interchanged" (R. 76). He therefore recommended that the Commission approve the merger application of Nelson Co. and Gilbertville Co. in MC–F–6099, subject to the elimination of certain dormant operating rights of Gilbertville (R. 78), and discontinue the investigation proceeding in MC–F–6178 (R. 79).

Upon exceptions, the Commission's Division 4 issued its report and order on February 26, 1958 (R. 82–95; 75 M.C.C. 45). The division concurred in the examiner's conclusion that the appellants had violated Section 5(4) of the Act, noting that none of the parties had challenged the examiner's findings of unlawful control (R. 85, 89, 91). The division's finding of

unlawful control was "not * * * based on any single factor or several selected from the whole, but on the entire chain of circumstances revealed by the record" (R. 91). However, contrary to the examiner's recommendation, the division decided that the parties' application should be denied. It ruled that "[c]onsidering all the circumstances" the violation "should not be 'blessed' by approval", but should be terminated, stating that "the transaction has not been shown to be consistent with the public interest" (R. 93). The division pointed out that by "premature consummation" of mergers as here, the Commission is "impeded in the discharge of [its] statutory duty to consider the entire transaction in all its aspects" (R. 92). And it emphasized that Nelson's and Gilbertville's principals were familiar with the motor carrier business and its regulation, and had participated in other Section 5 proceedings (R. 92–93). Accordingly, Division 4 entered an order denying the merger application and directing all the respondents "to terminate the violation of the provisions of Section 5(4) of the Interstate Commerce Act found * * * to have been accomplished and to be continuing", in the unlawful common control of Nelson and Gilbertville Cos. (R. 94–95). One Commissioner dissented (R. 93).

The proceedings were thereafter reopened by the division for reconsideration (R. 95–96), and then transferred to the full Commission (R. 13). The entire Commission issued its report and order on reconsideration on June 9, 1959 (R. 11–26). It affirmed the findings of violation and found "that the control and management of the L. Nelson & Sons

Transportation Co., in a common interest with Gilbertville Trucking Co., Inc., has been effectuated and is continuing in violation of Section 5(4) of the Interstate Commerce Act" (R. 23–24). In that connection, it found that Kenneth Nelson, who purchased the entire capital stock of Gilbertville Co. in 1953, was "affiliated" with Nelson Co. within the meaning of that term in Section 5(6) of the Act (R. 21); and noted that Section 5(5) provides that acquisition by a person "affiliated" with another carrier "shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers" in violation of Section 5(4).

The Commission recognized, citing its recent decision in another case, that violation of Section 5(4) "is not necessarily a bar to approval * * * if, upon consideration of all the facts, it clearly appears that the public interest will be served best by such approval" (R. 22). It determined, however, that the evidence would not "support a finding that the transaction for which authority is sought would be consistent with the public interest" (R. 23).[12] Accordingly, an order was entered on June 9, 1959, denying the application and directing respondents to terminate the violation of Section 5(4) and "to divest themselves of any and all interest which they may have

[12] Three Commissioners dissented. Commissioner Freas concurred in the result, expressing the view that the application to merge should be denied "not so much because of any evidenced disregard of the law but principally because of a lack of a clear showing that there is a paramount overriding public interest which would best be served by a grant of the approval sought" (R. 24).

in the capital stock in Gilbertville Trucking Co., Inc. * * * within 60 days" (R. 25–26).[11]

D. THE DECISION OF THE DISTRICT COURT

By its opinion and judgment of July 7, 1961, the three-judge district court dismissed the appellant's complaint and sustained the Commission's action (R. 108–127). The court (per Judge Wyzanski) held that the Commission's findings were "satisfactory not merely in form but in substance", were supported by the record (R. 121), and fulfilled "[t]he purpose * * * to furnish the parties and the reviewing court with a sufficiently clear basis for understanding the premises used by the tribunal" (*ibid.*). With the "dominant issue of fact" correctly resolved, the presence of a few "inconsequential" or "ambiguous" statements in the agency's opinion does not, he stated, require a "new total appraisal" (R. 121–122).

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[11] This order of June 9, 1959, has not yet taken effect. Nelson Co. and Gilbertville Co. thereafter filed with the Commission a petition for reconsideration of its report and order, which was denied by order of February 15, 1960 (R. 27–28). Nelson Co. then filed a petition seeking voluntary cancellation of its own outstanding operating authority, upon the condition that the Commission would vacate its orders of June 9, 1959, and February 15, 1960 (R. 7–8). On July 5, 1960, the Commission denied this Nelson Co. petition, and ordered compliance 15 days thereafter (R. 28–29). After the instant action was filed in the district court on August 5, 1960, the Commission postponed the effective date for compliance until its further order (R. 99, 101–102).

While the complaint below was directed in terms to the orders of the Commission on June 9, 1959, February 15, and July 5, 1960 (see R. 25, 27, 28), the substantive issues are all presented by the order of June 9, 1959, set forth at R. 25–26.

The court observed that the subsidiary findings established a violation of Section 5(4), the Commission's conclusion being "not merely reasonable but inevitable" (R. 122). The court noted particularly that "purposeful dovetailing for a common set of ends" was shown by the convergence of "[m]any phases" of the business of Nelson and Gilbertville Cos., beginning with the purchase of Gilbertville Co. by Kenneth Nelson "at a moment when he is not shown to have severed a relationship to the arterial traffic nerve of" Nelson Co. (R. 122). This determination did not "require resort to any legislatively enacted definitions or presumptions," although it was "confirmed" by such provisions in the Interstate Commerce Act, Sections 5 (5), (6) (R. 123).

Finally, the court held that the Commission properly exercised its discretion to choose an appropriate remedy for violation of Section 5(4). Divestiture orders were authorized by the broad power under Section 5(7), to "take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation". Indeed, the order of divestiture had a "fitness so perfect" to the offense of unlawful control as to be "obviously a suitable exercise of discretion" (R. 125). Similarly, the court upheld denial of the company's application to merge. While approval of an unlawfully effectuated merger in "some imaginable circumstances * * * might conceivably be in the public interest", the Commission's refusal to convert into a "lawful unification" "a relationship already in part achieved by unlawful conduct is

a clearly proper exercise of a delegated discretionary authority" (R. 126).

SUMMARY OF ARGUMENT

The Interstate Commerce Act authorizes the Commission to approve mergers, acquisitions of one carrier by another, or common control of two carriers, which it finds "consistent with the public interest" (Section 5(2)). Section 5(4) declares any such transaction consummated without approval by the Commission to be unlawful. Section 5(5) provides that various transactions involving persons "affiliated" with a carrier "shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers" in violation of 5(4). Section 5(6) defines "affiliation" with a carrier as any relationship giving "reason to believe" that a person will operate "in the interest of" that carrier or any other carrier controlled by him.

These prohibitions are applicable to motor carriers. Their importance is demonstrated by the Commission's experience in many cases, in which motor carriers seek to evade restrictions upon their operating authority by unlawful control of other carriers and to accomplish what Congress sought to prevent—an acquisition "without supervision by the Commission and without opportunity to consider the question of public interest" (77 Cong. Rec. 4857).

I

In the present case, the hearing examiner, Division 4, the Commission and the district court all correctly found that appellants had violated Section 5(4) by operating Gilbertville Co. and Nelson Co. under common control without Commission approval.

A. The Commission's ultimate finding is clearly supported by adequate subsidiary findings and substantial evidence. The Commission affirmed the findings of unlawful common control made directly under Section 5(4) by the examiner and the division. It also found a violation of Section 5(4) on the ground that Kenneth Nelson was "affiliated" with Nelson Co. within the meaning of Sections 5(5) and 5(6).

Contrary to appellants' contention, there is no material difference between these two approaches. Subsections 5(5) and 5(6) were designed merely "to spell out and make clear the various possible forms of indirect control * * * [Section 5(4)] is intended to prohibit" (S. Rep. 87, 73d Cong., 1st Sess., pp. 9–10). The finding of "affiliation" in this case is simply a finding that, on all the pertinent facts, unlawful common control was effectuated through an intermediary, Kenneth Nelson. This conclusion is clearly supported by substantial evidence which shows that, after Kenneth Nelson's purchase of Gilbertville Co., the two companies were brought together into what the examiner found was "operation as * * * a unified organization" (R. 69). Appellants have never disputed the factual statements of the examiner and the factors considered in other Commission decisions on this subject support the conclusion of unlawful control here.

B. The district court properly sustained the Commission. There was no divergence in legal rationale between the court and the Commission. As above stated, there is no inconsistency between finding a violation of Section 5(4) directly and finding it through the "affiliation" route of Sections 5(5) and 5(6). In any event, the court and Commission each relied upon both statutory approaches. There is no substance to appellants' claim that inconsistencies in the factual statements of the court and Commission warranted reversal and remand.

II

The Commission properly denied appellant's application to merge Nelson Co. and Gilbertville Co. and thereby validate the existing unlawful situation, and properly directed divestiture of appellants' interests in Gilbertville Co.

A. Contrary to appellants' contention, the Commission has not created a new policy of "automatically" denying an application under Section 5(2) whenever a violation of Section 5(4) has been found. The Commission's "more stringent approach" towards such violations (R. 23), which was applied in the *Central of Georgia* case, 307 I.C.C. 39, and reaffirmed here, simply recognizes that one factor in the "public interest" is the "maintenance of respect for and the observance of the law." For applications involving such violations, the test is whether "upon consideration of all the facts, it clearly appears that the public interest will be served best by such approval" (307 I.C.C. at 43, quoted at R. 22). Numerous Commission decisions

reiterate that such violations are weighed against the benefits of approval, but can be outweighed by overriding benefits to the public, or mitigated by proof of lack of awareness of the requirements of Section 5.

This policy is a proper implementation of the statutory criterion of "public interest" since unlawful acquisitions of control would seriously hinder, if not defeat, the administration of Section 5. The Commission's approach is supported by its experience with such cases, and by the policies of other agencies; its validity is not impaired by employment of a less stringent policy in the past.

The Commission properly applied its policy in this case. Appellants used unlawful control over Gilbertville Co. to enlarge operations without Commission approval. While they now seek to rely upon the service cultivated under unlawful control to show the benefit from approval of the merger, the Commission properly gives no weight to such unlawful service. Denial was justified by the existence of the violation of Section 5(4), the clear evidence that appellants were aware of Section 5 requirements; and the absence of any proper showing (not depending upon the violation itself) that the merger of Gilbertville Co. and Nelson Co. would serve the public interest.

B. The Commission's order of divestiture was clearly a proper exercise of its discretion once it had found unlawful control and refused to validate it by approving the merger. The Commission is authorized "to require [appellants] to take such action, as may be necessary, in the opinion of the Commission, to pre-

vent continuance of the violation" (Section (5)(7)). Divestiture is "the usual procedure in investigations under section 5(7)" (*Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co.*, 90 M.C.C. 113, 121 (Div. 3)). It is an appropriate, if not the only feasible, way to terminate unlawful acquisition of control, and it was explicitly put at issue before the agency in this case. Since the Commission had found that the unlawful control was effectuated through Kenneth Nelson as an intermediary, the order properly ran against him.

ARGUMENT

INTRODUCTION: THE STATUTORY SCHEME

A. By Section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2), the Commission is authorized to approve merger of carriers, the acquisition of one carrier by another, or the control of two or more carriers by a non-carrier, when it determines that such "proposed transaction * * * will be consistent with the public interest".[14] In determining the "public interest", as this Court pointed out in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 82–83, the Com-

[14] The Commission's power to approve mergers and acquisitions of control, along with an immunity from the antitrust laws for approved transactions, was first introduced by the Transportation Act of 1920, 41 Stat. 456, 480, 481–482. Previously, Commission authorization was not required but acquisitions were subject to the Sherman A . See, e.g., *United States* v. *Union Pacific R. Co.*, 226 U.S. 61.

Under Section 5 of the 1920 Transportation Act, acquisitions involving consolidation of railroads into single systems had to conform to a national plan of consolidation to be adopted by the Commission. These requirements were eliminated in the revision of Section 5 in the Transportation Act of 1940, 54 Stat. 899, 905.

mission must be guided by the National Transportation Policy which requires it to "promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."[15] Section 5(2)(c) directs the Commission, more specifically, to give weight to the following considerations "among others": "[t]he effect of the proposed transaction upon adequate transportation service to the public; * * * the total fixed charges resulting from the proposed transactions; and * * * the interest of the carrier employees affected". *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 75. In addition, the Commission has the duty to formulate and consider other factors implementing the statutory criterion of "public interest". *Schwabacher* v. *United States*, 334 U.S. 182, 193. *McLean Trucking Co.* v. *United States*, 321 U.S. at 86–88; *United States* v. *Lowden*, 308 U.S. 225, 238.

B. Since 1933, the Commission's authority to approve mergers has been accompanied by sweeping prohibitions against action taken without Commission approval, a pattern which has been followed in sub-

[15] Before adoption of the National Transportation Policy, similar considerations had been noted by the Court as subsumed under the standard of "public interest". That statutory term itself directs attention, *inter alia*, "to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities". *New York Central Securities Co.* v. *United States*, 287 U.S. 12; *Texas* v. *United States*, 292 U.S. 522, 531.

sequent federal regulatory acts.[16] As it now stands, Section 5(4), "in the broadest terms",[17] makes it unlawful, without Commission approval, "to enter into any transaction within the scope of" such approval,

> or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. * * * As used in this paragraph and paragraph (5) * * *, the words "control or management" shall be construed to include the power to exercise control or management.[18]

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[16] Federal Power Act, 49 Stat. 849, Sec. 203, 16 U.S.C. 824b; Federal Aviation Act, 72 Stat. 767, Sec. 408, 49 U.S.C. 1378.

[17] *United States* v. *Marshall Transport Co.*, 322 U.S. 31, 38.

[18] As originally enacted in the Emergency Railroad Transportation Act of 1933, the present Sections 5(4), 5(5), and 5(6) were numbered 5(6), 5(7), and 5(8). 48 Stat. 218. The paragraphs were renumbered to their present arrangement in the Transportation Act of 1940, 54 Stat. 905, 907–908.

The broad scope of the prohibition against unauthorized "control" is again emphasized by Section 1(3)(b) which provides that, for the purposes of Section 5 and other sections, "where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

As the Congressional committee reports stated of 5(4), "A means having been furnished * * * by which all legitimate and desirable forms of unification may be effected, it is intended * * * to prevent all other forms, direct or indirect". S. Rep. 87, 73d Cong., 1st Sess., p. 9; H. Rep. 193, 73d Cong., 1st Sess., p. 16.

Section 5(5) supplements this prohibition, without "in anywise limiting" it, by providing that various transactions involving persons "affiliated" with a carrier "shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers". One of these is a "transaction * * * by a person affiliated with a carrier, * * * if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier". And Section 5(6) provides that

> a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

The committee reports explain that these provisions were "designed to spell out and make clear the various possible forms of indirect control * * * which

paragraph [5(4)] is intended to prohibit." S. Rep. 87, 73d Cong., 1st Sess., p. 9; H. Rep. 193, 73d Cong., 1st Sess., p. 16. The reports continued (S. Rep. 87, at pp. 9–10, H. Rep. 193, at pp. 16–17):

> These paragraphs have been planned in the light of what has already been done through myriad devices without commission supervision and in defiance of the will of Congress. * * * The provisions of paragraph [(4)] would be of little effect unless the language contained therein were construed to include control or management effectuated or exercised indirectly through the use of legal devices such as holding companies, voting trusts, and combinations of affiliated interests. It is therefore intended by the provisions of paragraph [(5)], [(6)] * * * to make sure that paragraph [(4)] covers such types of control and management.

The House Manager of the bill similarly observed (77 Cong. Rec. 4857):

> The important point is that unifications and groupings of railroads have been accomplished entirely without supervision by the Commission and without any opportunity to consider the question of public interest. * * * It is to correct this condition, and to prevent through the use of holding companies and other devices the defeat of the congressional will, that this bill has been drawn.

Petitioners stress that Congress was concerned in the original passage of Sections 5 (4), (5), and (6), with the elaborate corporate structures of the railroad empires (App. Br. pp. 18–19, and nn. 9, 10). It is true, of course, that in 1933 the Commission's juris-

diction was limited to railroads. But when the Motor Carrier Act was passed in 1935, precisely the same policy was extended to motor carriers. The 1935 Act contained a provision similar to Section 5 (Section 213, 49 Stat. 543, 555), which, as explained by the Senate Manager of the bill, conferred authority upon the Commission to approve mergers and acquisitions "and prohibits all other forms of unification". 79 Cong. Rec. 5655. It was recognized that motor carriers were then mostly "small enterprises" but there were "rumors" of merger plans. "In view of past experience with railroad and public utility unifications, it was regarded as necessary that the Commission have control over such developments". 79 Cong. Rec. 5654–56.[19] In the Transportation Act of 1940, this separate motor carrier provision was repealed, and Section 5 was redrafted to cover all motor, rail and water carriers subject to the Commission's jurisdiction. There is no doubt that the provisions and prohibitions of Section 5 are applicable to motor carriage, as well as to railroads, and that the guiding policy considerations are the same. See *McLean Trucking Co.* v. *United States,* 321 U.S. at 78–79.

C. The Commission's recent experience in administration of the merger and acquisition provisions has been chiefly in the motor carrier field. A point re-

[19] Senator Wheeler added that Commission control should extend "where the number of vehicles involved is sufficient to make the matter one of more than local importance" 79 Cong. Rec. 5655. Accordingly, the Commission's authority over motor carrier mergers and acquisitions was, and is, limited to those involving more than 20 vehicles (Section 5(10), 49 U.S.C. 5(10)). See Section 213(e), 49 Stat. 556.

peatedly made in these decisions is that unlawful merger or acquisition of control can alter a carrier's circumstances in ways detrimental to the public interest even if the transaction is belatedly brought before the Commission for its approval. Premature consummation of even part of a merger, it has been noted, may damage the financial stability of a carrier and the adequacy of its service.[20] Moreover, such violations can establish new services which are not justified by the public interest.

Typically, a motor carrier, or its principals or intermediaries, acquires unlawful control of another carrier in order to expand its operations "circumventing the restriction in * * * [its existing] operating rights" (*Smithsons Holdings—Control—Ontario Frt. Lines Corp.*, 70 M.C.C. 623, 625, 628 (Div. 4)).[21] In

[20] For that reason, the Commission has held that when a merger or acquisition is subject to its approval because it involves interstate operating rights, the carriers may not consummate any part of the transaction. *Von Der Ahe Van Lines, Inc.—Lease and Purchase—Bee-Line*, 87 M.C.C. 53, 60. *Interstate M. Frt. System—Purchase—Capital Frt. Lines, Inc.*, 65 M.C.C. 37, 54 (Div. 4); *Texas, N. Mex. & Okla. Coaches, Inc.—Purchase—Aaron*, 55 M.C.C. 269, 275 (Div. 4). In the cited cases, the carriers sought to evade the Commission's jurisdiction by first consummating the parts of the merger involving transfer of equipment (*Von Der Ahe*) or intrastate operating rights (*Interstate M. Frt.; Texas, N. Mexico, & Okla. Coaches*). The Commission explained how such premature acts can damage the public interest by impairing interstate operations of the transferor carrier, causing losses and otherwise affecting carriers' financial stability. 65 M.C.C. at 54, 55 M.C.C. at 275.

[21] See, e.g., cases in following note and *Coldway Food Express, Inc.—Control and Merger*, 87 M.C.C. 123, 130-131 (Div. 4); *Dorn's Transportation, Inc.—Purchase—Phillips Exp., Inc.*, 87 M.C.C. 111, 112, 116 (Div. 4); *Congdon—Purchase—Wadkins*, 50 M.C.C. 781, 784 (Div. 4).

extreme cases, such violations have occurred after the Commission denied applications by the carriers seeking to achieve the same expansion lawfully.[22] Unlawful expansion may be attempted through control of dormant companies, which are then reactivated.[23] If advance Commission approval had been requested, as required by law, the Commission would have required a showing of the need for the new or extended service.[24] By unlawfully combining operations under common control, the two carriers, having actually experienced a close relationship before their belated application to merge is filed, may appear to be in better position to argue the benefits which would flow from continuing unified service.[25] But the Commission, of course, cannot countenance such an improper advantage.

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[22] *Krapf—Purchase—Altemose*, 85 M.C.C. 441, 443, 445 (Div. 4); *Houff—Control—Elliott Bros. Trucking Co., Inc.*, 80 M.C.C. 637, 648 (Comm.); *Black—Investigation of Control*, 75 M.C.C. 275, 279 (Div. 4); *Stacks—Investigation of Control*, 75 M.C.C. 625, 627, 637 (Div. 4).

[23] *Von Der Ahe Van Lines, supra*, 87 M.C.C. at 59; *Exley Express, Inc—Purchase—Olsen*, 85 M.C.C. 396, 397, 399 (Comm.); *Black, supra*, 75 M.C.C. at 279, 282–283; *Smithsons Holdings, supra*, 70 M.C.C. at 625, 628.

[24] *Houff Transfer* v. *United States*, 105 F. Supp. 851, 855, (W.D. Va.); *Shein* v. *United States*, 102 F. Supp. 320, 324–326 (D.N.J.), affirmed *per curiam*, 343 U.S. 944; *Falwell* v. *United States*, 69 F. Supp. 71 (W.D. Va.), affirmed *per curiam*, 330 U.S. 807.

[25] *Dorn's Transportation, supra*, 87 M.C.C. at 112–113; *Exley Express, Inc., supra*, 85 M.C.C. at 398; *Deaton Truck Line, Inc.—Purchase—Capitol Freight Lines, Inc.*, 70 M.C.C. 355, 360 (Div. 4); *Cortland Fast Freight, Inc.—Purchase—H. J. Korten, Inc.*, 60 M.C.C. 321, 329 (Div. 4); *Pacific Greyhound Lines—Control and Merger*, 56 M.C.C. 415, 438–439 (Div. 4).

Where the Commission can discover the facts concerning prior unlawful control, it responds by weighing the violations against grant of the belated application to merge, as shown *infra*, pp. 43–47, 50–54, and by giving "no weight whatsoever" to alleged benefits which depend upon the unlawful operations.[26] Where the violations are undiscovered, of course, the parties may succeed in accomplishing what Congress sought to prevent—an acquisition "without supervision by the Commission and without any opportunity to consider the question of public interest" (77 Cong. Rec. 4857).

I

APPELLANTS WERE PROPERLY FOUND IN VIOLATION OF SECTION 5(4) OF THE ACT, ON THE GROUND THAT NELSON AND GILBERTVILLE COS. WERE UNDER UNLAWFUL COMMON CONTROL

As the court below stated, this case presents "one dominant issue of fact * * * the issue of common control" (R. 122). On this point, the record has been canvassed by the hearing examiner, the Commission's Division 4, the full Commission, and the district court. All have agreed that Nelson and Gilbertville Cos. were controlled or managed in a common interest, without Commission approval, in violation of Section 5(4) of the Act. We submit that this issue was correctly decided by the administrative agency and that there is, indeed, no serious basis for challenge.

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[26] *Deaton Truck Line, supra*, 70 M.C.C. at 360; *Cortland Fast Freight, Inc., supra*, 60 M.C.C. at 329; *Pacific Greyhound Lines, supra*, 56 M.C.C. at 438-439.

A. THE COMMISSION CORRECTLY FOUND UNLAWFUL COMMON CONTROL OF NELSON AND GILBERTVILLE COS.

In its decision on reconsideration, the full Commission summarized the evidence, after noting that "none of the parties * * * have disputed the factual statements of the examiner in his report, which were generally adopted in the prior report of the division" (R. 19). It then concluded (R. 21):

> Considering all facts of record, we are of the opinion, and find that Kenneth Nelson was affiliated with Nelson within the meaning of section 5(6) at the time he purchased the stock of Gilbertville, and that the conclusive presumption of section 5(5) applies; we affirm the findings in the prior report, and in the report of the examiner, that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4) of the act.

1. Appellants (Br. pp. 13–19) assail the Commission for failing to make subsidiary findings to support the finding of "affiliation", and for failing to indicate the precise "relationship" between Kenneth Nelson and Nelson Co. In the first place, appellants ignore that, aside from the Commission's ruling on Kenneth Nelson's affiliation with Nelson Co., it also specifically "affirm[ed] the findings" of Division 4 and the examiner (R. 21). The latter had found that the two companies "are controlled or managed in a common interest in violation of section 5(4)", without expressly invoking the affiliation provisions of sections

5(5) and 5(6), but rather on the basis of the "entire chain of circumstances revealed by the record", (R. 91, see R. 70).

But, in any event, appellants are in error in their apparent belief that "affiliation" for purposes of subsections 5(5) and 5(6) always connotes a precise relationship—*e.g.*, "holding company", "brother" (App. Br., p. 18), and that it is an "entirely different" concept from unlawful control prohibited by Section 5(4) (App. Br. pp. 28–29).

On the contrary, there is only one statutory prohibition against unlawful control, that set forth in Section 5(4). As we have shown *supra*, pp. 25–27, Congress did not intend, in Sections 5(5) and 5(6), to add a separate condemnation of particular categories of relationships. Rather, it sought to emphasize the broad reach of Section 5(4) by adding a legislative gloss—"to spell out and make clear the various possible forms of indirect control * * * which [5(4)] is intended to prohibit" and "to make sure" that Section 5(4) was effective to thwart all manner and means of "indirect control", however attained (S. Rep. 87, 73d Cong., 1st sess., pp. 9–10).

Section 5(4) defines "control" to include "the power to exercise control or management" and prohibits its unauthorized accomplishment "however such result is attained, whether directly or indirectly". Such power may be found in specific legal relations. Section 5(4) explicitly points to "common directors, officers or stockholders, a holding or investment company or companies, a voting trust or trusts." But in order to reach all unlawful control "however * * * attained",

it also extends to control obtained by "any other manner whatsoever". See *United States* v. *Marshall Transport Co.*, 322 U.S. 31, 38.

"Affiliation" is similarly defined in Section 5(6) to include the identical legal devices cited in Section 5(4). To reach the "myriad devices" possible (S. Rep. 87, *supra*), Section 5(6) also extends to any "relationship" adduced from "the method of, or circumstances surrounding organization or operation" of a carrier and "any other direct or indirect means" which make it "reasonable to believe" that a person will manage the affairs of another carrier controlled by him in the interests of the carrier with which he is "affiliated". As the Commission pointed out in *Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co.*, 90 M.C.C. 113, 119–120, circumstances bearing on the "degree of relationship" include relations between the carriers' officers, directors and stockholders and, also, the carriers' operating practices and business dealings with each other.

"Affiliation" is therefore flexible enough to cover the "myraid devices" (*ibid.*) which might be used to acquire control of carriers without Commission supervision, whether through complex corporate configurations or the disingenuous use of an individual as an intermediary or "front". A finding of "affiliation" may, as in this case, be a conclusion drawn from all the facts as to the likelihood that an individual will act in behalf of a particular carrier.

2. So viewed, the Commission's finding of "affiliation" in this case is a finding that, on the basis of all the pertinent facts, common control was unlawfully

effectuated over Nelson and Gilbertville Cos. by the use of an intermediary, Kenneth Nelson. The Commission's conclusion to that effect must be accepted if supported by substantial evidence. *United States* v. *Pierce Auto Lines*, 327 U.S. 515; *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 508.

We submit that the Commission's determination is amply supported by the record. We have set forth in the Statement (*supra*, pp. 6–12), the details concerning the relationships of Kenneth Nelson, Nelson Co. and Gilbertville Co. The Commission's summary of the evidence in its report shows what the examiner found, *i.e.*, that the two companies have been brought together into "operation as * * * a unified organization" (R. 69). The findings include the joint use by Nelson and Gilbertville Cos. of terminals and telephone numbers; various arrangements by which the companies drew freely on each other's vehicles and drivers, including constant and frequent leasing of vehicles by Gilbertville from Nelson Co.; the pooling and commingling of shipments to suit their convenience; arbitrary division of revenues from interline carriage according to a fixed formula, instead of the usual trade practice of computing the actual length of the companies' respective hauls; the transportation of interlined shipments as a through movement, by transfer of vehicle and driver from one company's employment to the other; the extremely "liberal" handling of intercompany debit balances; and various activities engaged in by officials and employees of each company for the benefit of the other (R. 20–21).

This unlawful unified control in violation of Section 5(4) was achieved by Kenneth Nelson's purchase and management of Gilbertville Co. Thus, in Section 5(6) terms, we have far more than "reason to believe" that Kenneth Nelson was acting "in the interest of" Nelson Co., and hence "affiliated" with it. Events subsequent to the purchase in March 1953 have laid to rest any conjecture and have demonstrated beyond doubt that unlawful control was achieved through his actions.

Since the finding of "affiliation" here is a conclusion drawn from all the facts as to the relations between Kenneth Nelson, Nelson Co. and Gilbertville Co., see *supra*, pp. 33–34, these facts themselves constitute the "adequate subsidiary findings" (*Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173, 193–194) required to support the decision. No intervening findings were appropriate or necessary. The Commission, applying its "expert's familiarity with industry conditions" (*American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 310, 314), properly evaluated the record and determined whether the business relations between Nelson and Gilbertville companies were those of independent concerns or demonstrated the existence of unlawful "control or management in a common interest".

Even though appellants never disputed the factual statements of the examiner and Division 4 before the Commission (R. 19), they now urge that certain of the Commission's subsidiary findings are not supported by substantial evidence (Br., pp. 48–54). In large part, appellants' argument is that

certain of the practices of Nelson and Gilbertville Cos. cited by the Commission are common in the trucking industry or are explained by legitimate business considerations rather than unlawful common control.[27] None of these attempted justifications of separate practices can detract significantly from the Commission's determination that the entire picture demonstrates the illegality of the relationship between the two carriers.

As the Commission's other decisions on this subject demonstrate, no one factor is ever considered decisive in itself. Division 3 pointed out recently in *Gate City Transport Co.—Control—Square Deal Cartage*, 87 M.C.C. 591, 594, that the common use of terminal facilities and employees by two carriers "does not necessarily connote common control" but it "must be considered along with all the other facts." See, to the same effect on leasing and interchange, *Kenosha Auto Transport Corp.—Investigation of Control*, 80 M.C.C. 59, 77 (Div. 4). Similarly, the examiner here pointed out (R. 64) that family ties are pertinent to an investigation into possible unlawful acquisition or control, although not themselves determinative. Applicants take the Commission to task for allegedly

[27] In addition, appellants dispute the Commission's statements as to (1) "managerial" activities for one carrier by officers of the other, supported by the record as to Kenneth Nelson's action in the Nelson Co. office, at R. 530-533, 539-540, and Clifford Nelson's Acts at R. 558-560; and (2) the shifting of equipment and driver from the employ of one company to another at interchange points, supported by the record at R. 510, 514-515, 541-543, 661-662.

finding "affiliation" solely because of Kenneth Nelson's blood relation with his brothers (B., pp. 18–19). Of course, no such rule was promulgated or applied here. The Commission is aware, however, that in seeking to conceal an unlawful acquisition of control, parties may—and frequently do—utilize close relatives,[28] as well as business associates or friends.

Without undue emphasis upon any one aspect of the instant case, it is significant to note how many of the factors cited by the Commission here are recurrent indicia of unlawful transactions. In many cases finding violations of Section 5(4), the Commission has cited the sharing by the two carriers of common terminal and office facilities;[29] the sharing of telephone numbers (listed in both names) and teletype systems;[30] generous credit arrangements between the

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[28] *Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co.*, 90 M.C.C. 113, 119–120 (Div. 3); *Dorn's Transportation, Inc.—Purchase—Phillips Exp., Inc.*, 87 M.C.C. 111, 115 (Div. 4); *Smithsons Holdings—Control—Ontario Frt. Lines Corp., supra*, 70 M.C.C. 623, 626 (Div. 4). In the last cited case, as here, the Commission had to reject a plea that the "human quality of family ties" justified the relation between the two carriers which was found to constitute unlawful control in violation of Section 5(4).

[29] *Nigro Freight Lines, Inc., supra*, 90 M.C.C. at 118–119; *Gate City Transport Co., supra*, 87 M.C.C. at 593–594; *Coldway Food Express, Inc.—Control and Merger*, 87 M.C.C. 123, 128–129 (Div. 4); *Dorn's Transportation, Inc., supra*, 87 M.C.C. at 115; *Kenosha Auto Transport Corp.—Investigation of Control*, 80 M.C.C. at 69–72; *Black—Investigation of Control*, 75 M.C.C. 275, 281 (Div. 4).

[30] *Nigro Freight Lines, Inc., supra*, 90 M.C.C. at 118–119; *Coldway Food Express, Inc., supra*, 87 M.C.C. at 128–129; *Kenosha Auto Transport Corp., supra*, 80 M.C.C. at 72.

carriers;[31] the performance by one of the two carriers of all the billing on freight interlines between them regardless of which delivered;[32] the provision of other services for one carrier by employees of the other;[33] the active leasing of vehicles by one carrier from the other;[34] special arrangements between them for repair and maintenance of vehicles;[35] increase in interlining of freight between the two carriers;[36] and the use of vehicles which are leased mid-trip from one carrier to the other, with the same driver being employed to carry the interlined freight under the authorities of both carriers.[37]

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[31] *Cortland Fast Freight, Inc.—Purchase—H. J. Korten, Inc.*, 60 M.C.C. 321, 325–326.

[32] *Coldway Food Express, Inc., supra*, 87 M.C.C. at 129; *Exley Express, Inc.—Purchase—Olsen*, 85 M.C.C. 396, 400 (Comm.).

[33] *Gate City Transport Co., supra*, 87 M.C.C. at 593; *Kenosha Auto Transport Corp., supra*, 80 M.C.C. at 72; *Cortland Fast Freight, Inc., supra*, 60 M.C.C. at 326.

[34] *Nigro Freight Lines, Inc., supra*, 90 M.C.C. at 118–119; *Coldway Food Express, Inc., supra*, 87 M.C.C. at 129; *Exley Express, Inc., supra*, 85 M.C.C. at 399–409; *Kenosha Auto Transport Corp., supra*, 80 M.C.C. at 69–72, 77; *Black, supra*, 75 M.C.C. at 281–282.

[35] *Nigro Freight Lines, Inc., supra*, 90 M.C.C. at 118–119; *Gate City Transport Co., supra*, 87 M.C.C. at 593; *Cortland Fast Freight, Inc., supra*, 60 M.C.C. at 326.

[36] *Nigro Freight Lines, Inc., supra*, 90 M.C.C. at 117–119; *Dorn's Transportation, Inc., supra*, 87 M.C.C. at 115; *Exley Express, Inc., supra*, 85 M.C.C. at 399–400; *Black, supra*, 75 M.C.C. at 282; *Cortland Fast Freight, Inc., supra*, 60 M.C.C. at 325–326.

[37] See *Nigro Freight Lines, Inc., Exley Express, Inc.*, and *Black*, cited in previous note.

B. THE DISTRICT COURT PROPERLY SUSTAINED THE COMMISSION'S DECISION

On this aspect of the case, appellants (Br., pp. 22–29) focus on differences between the statements of the case by the court and Commission. They assert that, because of these alleged differences, the court in effect substituted a "judicial judgment * * * for an administrative judgment", in violation of the rule of *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88.

At the outset, Judge Wyzanski's opinion clearly refutes any implication that the court misapprehended the proper scope of judicial review. It posed the questions in the case as the validity of the Commission's order in terms of adequacy of findings, substantiality of the underlying evidence, and sufficiency of the findings to support relief (R. 115). The court resolved each of the stated issues in favor of the Commission, emphasizing throughout its reliance upon the Commission's findings and discretion (R. 120–126).

The obvious intent of the district court was, we believe, carried out in its handling of the factual and legal issues involved in finding a violation of Section 5(4). Taking first the alleged divergence in legal rationale, appellants assert (Br., pp. 26–29) that the district court found a violation of Section 5(4), while the Commission found a violation of different prohibitions contained in Sections 5(5) and 5(6). We have already shown, *supra*, pp. 33–34 that there is only one statutory prohibition—the one set out in Section 5(4); that these provisions are not separate and distinct; that the same evidence is material to both; and that Sections 5(5) and 5(6) are supplementary

reiterations of a kind of unlawful control—that achieved through "affiliated" intermediaries—which Section 5(4) itself prohibits. There is no inconsistency, therefore, between finding violation of Section 5(4) directly and finding such violation through use of the "affiliation" subsections.

In any event, both the court and the Commission relied upon both statutory approaches—the direct prohibition of Section 5(4) and the "affiliation" route. The district court held that violation was established by the sum of evidence concerning the activities of and relations between Nelson and Gilbertville Cos., adding up to "purposeful dovetailing for a common set of ends" (R. 122). The court further stated that, while the conclusion "does not * * * require resort to" Sections 5(5) and 5(6), it "is confirmed, and at no juncture contradicted, by the statutory definitions and presumptions" in the latter provisions (R. 123). Similarly, the Commission found that Kenneth Nelson was "affiliated" with Nelson Co. when he purchased Gilbertville Co. and that the statutory presumption of Section 5(5) applied. But the Commission also specifically "affirm[ed] the findings" of Division 4 and the examiner, both of whom had found unlawful common control in violation of Section 5(4) without utilizing the presumption (R. 21), and expressly incorporated Division 4's report in its order (R. 25).[28]

[28] Minor factual differences alleged (App. Br., pp. 22-26) between the court's statement of the case and the Commission's obviously would not justify a remand in the absence of a "solid reason" for concluding that the points of difference could have produced a change in the result. *Communist Party* v. *Sub-*

II

THE COMMISSION PROPERLY DENIED THE APPELLANTS' APPLICATION TO MERGE THE COMPANIES FOUND UNDER UNLAWFUL COMMON CONTROL AND PROPERLY DIRECTED DIVESTITURE OF GILBERTVILLE CO.

After finding that Nelson Co. and Gilbertville Co. were under unlawful common control, the Commission had to pass upon appellants' application to merge, "in effect a request for validation of the existing unlawful control".[39] We submit that the Commission properly denied the application and, in order to terminate the unlawful control, properly directed divestiture.

A. DENIAL OF THE APPLICATION TO MERGE WAS A PROPER EXERCISE OF DISCRETION UNDER SECTION 5(2)

In denying appellants' application to merge, the Commission stated that recently, in *Central of Georgia Ry. Co. Control,* 307 I.C.C. 39, it had affirmed "* * * the views heretofore followed, that law violations are not necessarily a bar to approval of an application, if the public interest will best be served by approval of the transaction presented" (R. 23). The

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versive Activities Control Board, 367 U.S. 1, 67. Here the district court did not repudiate any significant finding upon which the Commission itself "purport[ed] to rely" for its conclusions (367 U.S. at 67). It made additional factual statements supporting the same result, including Kenneth Nelson's continued employment by Nelson Co. after purchasing Gilbertville (n. 7, p. 7 *supra*). Some incorrect statements were made by the court (App. Br., p. 24, n. 14), but these were on immaterial matters, and, in any event, the court also quoted and relied upon, the Commission's statement of facts (R. 117–120).

[39] *Cortland Fast Freight, Inc.—Purchase—H. J. Korten, Inc.*, 60 M.C.C. 321, 327 (Div. 4).

Commission then quoted an excerpt from the report of Division 4 in this case, which stated that, although in the early days of regulation of motor carriers, "many.* * * transactions under Section 5 were approved, notwithstanding a showing of law violation," because of the "paramount public interest," "[n]ow * * * a more stringent approach is warranted" (R. 23). On the basis of these statements, appellants (Br., p. 32) claim that the Commission has "renounced" consideration of the "public interest" criteria of Section 5(2), and has adopted a policy of "automatic denial", "solely" because of the violation of Section 5(4). They urge (Br., pp. 29-37) that such a policy is contrary to the Interstate Commerce Act.

1. Appellants are tilting at the windmill of an alleged Commission policy which was never adopted and does not exist. In the *Central of Georgia* case, the Commission expressly rejected an argument by parties protesting the merger (307 I.C.C. at 43) that a violation of Section 5(4) required an automatic denial of an application under Section 5(2). And in this very case, as above noted, the Commission explicitly emphasized that violations of 5(4) "are not necessarily a bar to approval" of the merger (R. 23).

The point made by the Commission in *Central of Georgia*, and reaffirmed here, is that premature control in violation of Section 5(4) is an important element in the "public interest" appraisal of an application to merge: "The public interest is concerned not only with improvements in transportation service, but also with maintenance of respect for and observance of the law" (307 I.C.C. at 43, quoted at R. 22).

The Commission's policy, accordingly, is to give violations of Section 5(4) weight in deciding whether to approve a merger. The ultimate question remains the "public interest," and the merger will be allowed "if, upon consideration of all the facts, it clearly appears that the public interest will be served best by such approval" (*ibid*).

In the present case, the Commission followed its decision in *Central of Georgia* and considered appellants' violation of Section 5(4) in determining whether approval of their merger application would be "consistent with the public interest." This is clear from the Commission's statement that it could find no error in the findings or conclusions of Division 4, or "other basis upon which to arrive at a conclusion different than that reached in the *Central of Georgia case,* supra, or to support a finding that the transaction for which authority is sought would be consistent with the public interest under all the circumstances" (R. 23).[40]

The characterization of this policy as a "more stringent approach" (R. 23) than the one earlier followed is elucidated by the *Central of Georgia* case. There, Division 4 found an unlawful acquisition of control of *Central,* but an application for control was

[40] It is noteworthy that in his dissenting opinion, Commissioner Hutchinson objected to the decision, not because it was an "automatic" denial of the application, but because he would strike the balance differently from the majority: "On the record as a whole I would find the transaction to be consistent with the public interest" (R. 24). Similarly, Commissioner McPherson dissented for the reasons set forth in his dissent in the *Central of Georgia* case, *viz.*, that the benefits to the public "outweigh" the violation of Section 5(4) (307 I.C.C. at 45).

nevertheless approved on the ground it met the "[t]est of consistency with the public interest" from the standpoint of adequacy of service, economy, efficiency, etc. No weight was given the violation of Section 5(4) in making the "public interest" determination. 295 I.C.C. 563, 576.[41] On reconsideration, the Commission discussed the asserted public benefits (307 I.C.C. at 41) but emphasized what the division had ignored, *i.e.*, that the violation of Section 5(4) is a "public interest" factor which militates against approval (307 I.C.C. at 43–44). This means that an applicant has a greater burden to prove that the "public interest" supports his "proposed" merger if he has been guilty of unlawful acquisition of control.

The policy expressed by the Commission in *Central of Georgia* has been reaffirmed in numerous subsequent decisions, aside from the instant case. Thus, about two months after the Commission's ruling below, Division 4 decided *Sellers—Control—Huckabee Transport Corp.*, 80 M.C.C. 429, in which it found a violation of Section 5(4) and denied an application to merge. The division noted that, when there has been a "law violation", there is added to the "numerous factors considered" in determining public interest "the important question" of whether the parties should benefit from their unlawful acts, weighed against "the probable future public benefits" (80 M.C.C. at 448). It denied the merger on the ground

[41] For a similar approach in an earlier case, see the statements in *Atlas Van-Lines, Inc.—Control and Merger*, 70 M.C.C. 629, 662, that mergers may be approved, "despite unlawful control * * * when it was shown that transactions *otherwise* were consistent with the public interest" (emphasis added).

that "disregard and disrespect for the law" would not be approved, "in the absence of clear and forceful evidence that substantial public benefits would result" (*id.* at 450). See, also, *Houff-Control—Elliott Bros. Trucking Co.*, 80 M.C.C. 637, 650 Comm., "positive proof" of the public interest; *Kenosha Auto Transport Corp.—Contr —U.S.A.C. Transport, Inc.*, 85 M.C.C. 731, 736 (Div. 4), "strong affirmative evidence of public benefits"; *Dorn's Transportation, Inc.—Purchase*, 87 M.C.C. 111, 116 (Div. 4), "overriding public interest"; *Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co.*, 90 M.C.C. 113, 121 (Div. 3), "strong evidence" of public interest.

In considering the weight to be given violations of Section 5(4), the Commission takes into account the wilfullness of the violations. Recent cases denying applications because of such violations have distinguished prior approvals (notwithstanding such violations) in which there was "an absence of intent to flaunt the law or of a deliberate or planned violation" (*Kenosha Auto Transport, supra,* 85 M.C.C. at 736), or "mitigating circumstances * * * such as inexperienced parties without legal advice or unusual questions of law". *Houff, supra,* 80 M.C.C. at 650–651. The Commission has thus granted applications where it found that a prior violation was excused by unawareness of the violation due to "lack of timely and competent legal advice". *E. C. McCormick, Jr.—Control—A.C.E. Transportation Co.*, 80 M.C.C. 401, 414 (Div. 4); or a "good faith" misinterpretation of Section 5, *Taken Bros. Freight Line,*

Inc.—Control—Iowa-Nebr. Transp., 75 M.C.C. 236, 240–241 (Div. 4). However, the Commission has consistently held that there is no room for a claim of innocence when the applicant has previously participated in Section 5 proceedings. *E. g. Von Der Ahe Van Lines, Inc.—Lease and Purchase—Bee-Line*, 87 M.C.C. 53, 60; *Dorn's Transportation, Inc., supra*, 87 M.C.C. at 116; *Kenosha Auto Transport Corp.—Control, supra*, 85 M.C.C. at 736–737; *Houff—Control, supra*, 80 M.C.C. at 654.

2. We submit that this policy of the Commission is a proper implementation of the Interstate Commerce Act. Appellants (Br., p. 31) concede that the Commission may consider violations of Section 5(4) in determining the "fitness" of an applicant as an element of public interest under Section 5(2). In our view, it is clearly proper for the Commission to consider such a violation, not only as it affects the "fitness" of the applicant, but also as it affects the "public interest [in] * * * the maintenance of respect for and the observance of the law" (R. 22).

This Court has repeatedly recognized that the "wisdom and experience" of the Commission and not of the courts, must decide whether a proposed transaction is "consistent with the public interest" (*McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87–88; *Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173, 188). Reviewing courts are not "the arbiters of the paramount public interest" which is "the business of the Commission" (*United States* v. *Pierce Auto Lines*, 327, 515, 535, 526). In determining the factors pertinent to "public interest" under Section 5(2), the

Commission is not limited to those set out in the Act (*Schwabacher* v. *United States,* 334 U.S. 182, 193, *supra,* pp. 23–24). Likewise, the weight to be given the pertinent factors in an appraisal of public interest is for the Commission's "administrative discretion * * * to draw its conclusion from the infinite variety of circumstances which may occur in specific instances" (*Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65). As long as the Commission does not "exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by the evidence, it is not [the Court's] function to upset its order". *McLean Trucking Co.* v. *United States, supra,* 321 U.S. at 88.

The Commission's determination to consider unlawful control an element of "public interest", and to give it weight against approval of a merger, is based upon its clear understanding of the dangers posed by violations of Section 5(4). The evident purpose and effect of such violations is to achieve *de facto* merger without any governmental supervision and then, as the Commission put it, "to present a *fait accompli* for our approval" (R. 22, quoting *Central of Georgia Ry Co. Control,* 307 I.C.C. 39, 43). The Commission pointed out that the Act requires it to pass upon "proposed" mergers or acquisitions of control, *i.e.*, "prior to their consummation" and "including the justnesss and reasonableness of the terms upon which such control is to be acquired." If legal premature acquisitions were to be countenanced, the Commission's "administration of the statute in the public interest would be seriously hindered, if not defeated" (*id.* at 44).

Appellants dispute this appraisal. They contend (Br., p. 36) that "applicants who have previously violated Section 5(4) are not in any better position because of their violation," that "[i]n no sense is a '*fait accompli*' presented" because the Commission still has authority over approval of the merger. But we have already shown (*supra*, pp. 29–31) how changes in a carrier's circumstances during a period of unlawful control plainly can frustrate the statutory purpose of controlling mergers and acquisitions in the public interest.

The Commission's policy is strongly supported by the similar needs experienced by other agencies with authority to approve acquisitions in the public interest. The Federal Communications Commission has issued a public notice that transfer of a broadcasting station license without Commission approval "will be considered as possible grounds both for a disapproval of the transfer application and for the institution of revocation proceedings * * *" (Public Notice 20805, 4 Radio Reg. 342, August 25, 1948). The Civil Aeronautics Board has ruled that "in the absence of exceptional circumstances" it will not consider an application for approval of an acquisition "as long as the action or relationship exists in apparent violation of the Act, whether or not the action or relationship in question would ultimately be found to be consistent with the public interest" (*Sherman, Control and Interlocking Relationships*, 15 C.A.B. 876, 881).

Finally, the reasonableness of the Commission's policy is not impaired by the fact that it may have employed a less stringent policy in the past. In *Fed-*

eral Communications Commission v. WOKO, Inc., 329 U.S. 223, this Court upheld a denial of a renewal of a license to a station which had submitted false reports to the Commission, rejecting an argument that the action was arbitrary because it was "a departure from the course which the Commission has taken in dealing with * * * other [similar] cases" (*id.* at 227–228). The Court held that the Commission was entitled to take more "drastic measures" when its experience showed the need therefor. It stressed that "it is the Commission, not the courts," which is to weigh the violations against the quality of the station's service and "which must be satisfied that the public interest will be served by renewing the license" (*id.* at 229).

3. Turning to the application of the Commission's policy in this case, we submit that the denial of the application to merge Nelson and Gilbertville Cos. was an appropriate exercise of discretion. Indeed, this litigation provides an apt rebuttal to appellants' contention that no applicant is in a "better position" because of prior violation of Section 5(4) (Br., p. 36). The examiner found that the needs and ambitions of the Nelson Co. interests had crystallized into "an overall plan or project to create a larger and more significant motor carrier in the New England-Middle Atlantic area using Nelson as a nucleus" (R. 68–69).[42] Whether

[42] The president of Nelson Co., Charles Chilberg, testified that his company's certificate is limited to transportation for the textile industry in the New England area, and, with the movement of textile plants out of the area, Nelson Co. has sought to expand its operations into other areas and commodities. R. 394–395; see also R. 338 and the application in this case, R. 181.

such an enlarged carrier would be in the public interest is, of course, a question which should be determined by the Commission.

The first attempts to enlarge Nelson Co. were submitted to the Commission as "proposed" transactions in compliance with Section 5. In 1953, the Commission denied, as not consistent with the public interest, Nelson Co.'s application to acquire the operating rights of a bankrupt carrier, White's Express, authorized to transport general commodities in parts of New York, New Jersey, Connecticut and Pennsylvania. The Commission found that White's operating rights were dormant and that Nelson Co. had failed to make a showing of "public need" to revitalize those rights since adequate service was being provided by the existing carriers in the area (*L. Nelson & Sons Transport Co.—Purchase—White's Exp.*, 59 M.C.C. 675, 680). A subsequent application by the two principal stockholders in Nelson Co., Charles Chilberg and Clifford Nelson, to acquire Byrnes, Inc., a carrier of general commodities also in the Middle-Atlantic area, was granted by the Commission because the acquisitions would not result in a new unified service, due to the differences in commodities authorized to Nelson Co. and Byrnes (*Charles G. Chilberg and Clifford J. O. Nelson—Control—R. A. Byrnes, Inc.*, MC-F-5749—decision of Division 4, May 15, 1956, pp. 4–5).

The present application finally presented to the Commission Nelson Co.'s "overall plan" in full. A combination of the Byrnes and Gilbertville Co. authorities provides the basis, as the examiner found (R. 67), for "a through general commodity service be-

tween points in Massachusetts, Rhode Island and Connecticut, on the one hand, and, on the other, points as far south as the District of Columbia", as well as an expanded area of service for Nelson's textile carriage. If this application to acquire Gilbertville had been filed in March 1953, when that company was declining, having only one truck, three tractors and four trailers, and a $40,000 deficit, the Commission would have been presented with the question of the need for such new service, an issue analogous to that presented in *White's Express*. See also p. 30, *supra*. Instead, in the intervening period, Gilbertville was revived with the shifting of funds, efforts, equipment and personnel from Nelson Co., and it rapidly expanded in close relationship with the Nelson and Byrnes companies. In support of the belated application for merger in October 1955, appellants asserted the advantage to the public of combining into one firm the interchanges and other related services accomplished under unlawful common control (R. 180–181). Obviously, if the Commission were to ignore the violation of Section 5(4), appellants would be in a vastly "better position" (Br., p. 36) than they would have been had they submitted the "proposed" acquisition of Gilbertville for approval in 1953.

In his recommended report, the examiner failed to take proper account of the violation when he proposed to grant approval of the merger. He recommended that "[a] finding of unfitness by reason of violations is not warranted" (R. 73), because the violations "appear[ed] to be" the result of "ignorance" or "a degree of carelessness and not wilfulness" (R. 72). The examiner found the merger to be consistent

with the public interest, because competition with existing carriers "is either already an accomplished fact or capable of becoming so even though the present application is denied" (R. 74). He also found that the merger would result in better service and economies of operation (R. 76), while not adversely affecting employees or the "fixed charges" of Nelson Co. (R. 78).

It is obvious that the examiner considered the violation of Section 5(4) only as it affected the "fitness" of the appellants, and never considered that a factor of the public interest is (R. 22) "the maintenance of respect for and the observance of the law." Furthermore, his conclusion that the violations were due to "ignorance" and "carelessness" rather than "wilfulness" was inconsistent with his own finding that "an overall plan or project" to expand Nelson Co.'s operations "was conceived and followed", and is rebutted by the long experience of the appellants in the motor carrier field and in Section 5 proceedings (R. 23, 92–93). Finally, the examiner's conclusion that the merger would be consistent with the public interest was based on factors arising from the illegal relationship between Nelson Co. and Gilbertville Co. Thus, he treated the through-service created by interlining between Gilbertville and Byrnes, developed under unlawful common control as "an accomplished fact" (R. 74), an existing service, rather than as a new service for which a public need had to be shown. And he pointed to the benefits from unifying the service "presently interchanged" (R. 76).

Accordingly, the Division and the full Commission were justified in rejecting the examiner's recommendation and in deciding to deny the application to merge.

They properly gave weight to the finding of unlawful control as a "public interest" factor militating against approval, in accordance with the Commission policy already described. They also correctly rejected any excuse of "ignorance", following the uniform rule that prior participation in Section 5 proceedings establishes awareness of the law, *supra*, pp. 46–47. As to the countervailing public benefit, the Commission has repeatedly held that it will give "no weight whatsoever" to advantages generated by the unlawful operations—here, the interchanges sought to be combined.[43] In the absence of any showing of public need, or the inadequacy of existing service, appellants have failed to present evidence of the "overriding public interest"[44] required to outweigh the violation.

B. THE DIVESTITURE ORDER WAS A PROPER EXERCISE OF THE COMMISSION'S DISCRETION UNDER SECTION 5(7)

We have shown that the Commission properly found the Nelson and Gilbertville Cos. under unlawful common control, and properly decided not to validate this relationship but to disapprove the merger. The Commission was then under a statutory duty to "require [appellants] to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation" (Section 5(7), 49 U.S.C. 5(7)). This broad discretion clearly sustains the

[43] *Deaton Truck Line, Inc.—Purchase—Capitol Freight Lines, Inc.*, 70 M.C.C. 355, 360 (Div. 4). *Cortland Fast Freight, Inc.—Purchase—H. J. Korten, Inc.*, 60 M.C.C. 321, 329 (Div. 4); *Pacific Greyhound Lines—Control and Merger*, 56 M.C.C. 415, 438–439 (Div. 4).

[44] *Dorn's Transportation, Inc.*, 87 M.C.C. at 116; see also other cases cited *supra*, p. 46.

Commission's requirement of divestiture by the other appellants of their interests in Gilbertville Co.

Appellants concede that the Commission has authority to order divestiture in "an appropriate case" where a violation of Section 5(4) is found (Br., p. 38). But they claim that it cannot be sustained here because the Commission did not make specific findings that less drastic remedies were explored and found unavailing (Br., pp. 40–43, 46).

Far from being "harsh and inappropriate" (App. Br., p. 41), however, "ordering a divestiture" is "the usual procedure in investigations under section 5(7)" (*Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co.*, 90 M.C.C. 113, 121 (Div. 3). And it is easy to see why this is so. Violation of Section 5(4) consists of unauthorized acquisition by one carrier of control over another. The straightforward solution is to separate the acquiring carrier from the acquired, to terminate the violation by divestiture. Judge Wyzanski properly stated that "divestiture has a fitness so perfect that the order not merely is obviously a suitable exercise of discretion, but needs no gloss" (R. 125).[45]

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[45] The district court (R. 125) properly relied upon *United States* v. *du Pont & Co.*, 366 U.S. 316. In that case, the Court noted that under the antitrust laws where the "heart" of a violation is "intercorporate combination and control," "[d]ivestiture or dissolution has traditionally been the remedy" (*id.* at 329) and that it is "a natural remedy" for an unlawful acquisition (*id.* at 328). In the antitrust cases cited by appellants (Br., pp. 41–42) in which divestiture was rejected, the Court explicitly pointed out that no unlawful acquisition was involved in the violations found. See *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 603–604; *United States* v. *National Lead Co.*, 332 U.S. 319, 351–353.

The Commission's "usual" use of this remedy of divestiture is illustrated by numerous Section 5 cases heretofore cited.[46] It is particularly emphasized by a number of decisions, in which the Commission issued orders directing the parties in terms "to terminate violations" of Section 5(4), which the Commission itself characterized as "divestiture" orders. *Kenosha Auto Transport Corp.—Investigation of Control,* 80 M.C.C. 59, 77–79 (Div. 4); *Black—Investigation of Control,* 75 M.C.C. 275, 282–283 (Div. 4); *Houff—Control—Elliott Bros. Trucking Co.,* 70 M.C.C. 177, 194 (Div. 4), affirmed, 80 M.C.C. 637. The existence of a general administrative policy supporting the remedy of divestiture is also confirmed by the Section 5 cases in which the Commission formulates a remedy other than divestiture; for there the Commission deems it necessary to justify its deviation from the normal divestiture order.[47]

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[46] See cases cited *supra*, p. 38, and notes 28, 30. See also *United States Freight Co.—Investigation of Control*, 39 M.C.C. 623, 641–642; *Greyhound Corp.—Investigation of Control*, 45 M.C.C. 59, 81–82; *Casser—Control—Bingler Vacation Tours, Inc.*, 57 M.C.C. 53, 68.

[47] Thus, in *Central of Georgia Ry. Control*, 307 I.C.C. 39, the Commission explained the adverse economic effects which would follow if the illegally acquiring carrier "were required immediately to sell all of its interest in Central's stock". On that basis, it permitted the transfer of the stock into a voting trust in which the acquiring carrier had only beneficial interest, but no power to control (pp. 44–45).

On the other hand, in *Nigro Freight Lines*, *supra*, the Commission rejected the "usual" divestiture remedy on the ground that it was inadequate. The theory of such a remedy, the

Although appellants (Br., p. 46) argue that "a number of effective alternative remedies must have been available" here, they suggest only one example, that the Commission could direct the severance of the "affiliation" found between Kenneth Nelson and Nelson Co. But the finding of "affiliation" was a finding that Kenneth Nelson was acting on behalf of Nelson Co. interests in acquiring and operating Gilbertville Co. See pp. 34–39, *supra*. His connection with Nelson Co., developed on the basis of intangible family ties, could not be effectively severed. Clearly, the only practical way to separate the two companies and end the unlawful common control was to require Kenneth Nelson to divest himself of his stock in Gilbertville Co. This is the usual remedy. In other cases, where violation of Section 5 is based on a finding of acquisition by a person "affiliated" with another carrier, the divestiture order invariably covers the "affiliated person". E.g., *Sellers—Control—Huckabee Transport Corp.*, 80 M.C.C. 429, 450–451, *Kenosha Auto Transport Corp.—Investigation of Control*, 80 M.C.C. 59, 78–79 (Div. 4), *Stacks—Investigation of Control*, 75 M.C.C. 625, 638–639 (Div. 4). Similarly, where there is no specific finding of "affiliation" under Section 5(6), but a common control is found to have been effectuated through an acquisition by an intermediary or "front";

Commission noted, is that the carriers can be separated from each other into independent, lawful operations. But since, in *Nigro* the operations of the acquired carriers in interstate commerce had been illegal from their inception, and were so intertwined with *Nigro* that separation did not appear feasible, the Commission ordered the acquired companies to discontinue all operations in interstate or foreign commerce. 90 M.C.C. at 121.

the divestiture order includes all those respondents who participated in the acquisition. *E.g., Coldway Food Express, Inc.—Control and Merger*, 87 M.C.C. 123, 130–131 (Div. 4); *Black—Investigation of Control*, 75 M.C.C. 275, 281–282 (Div. 4).

In reviewing administrative remedies, the "courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473; *Federal Trade Commission* v. *Mandel Bros.*, 359 U.S. 385, 392–393. Certainly, the remedy chosen here—one which directly terminated the illegal conduct—cannot fail to meet that test. Divestiture is the obviously appropriate means of dealing with prohibited acquisitions, and the Commission was well within its authority in concluding that it should be adopted in the absence of strong countervailing considerations.[48]

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[48] Appellants contend (Br. 19–21) that there were no adequate findings as to "continuance" of the violation which would justify an order under Section 5(7). Both Division 4 (R. 91, 93) and the Commission (R. 21, 29) expressly found, however, that the violation was continuing. Moreover, Division 4 noted that "no party of record excepts to the examiner's findings that the respondents have effectuated or participated in the effectuation of the control and management of Nelson in a common interest with Gilbertville in violation of section 5(4), *and that the violation is continuing*" (R. 89) (emphasis added). Appellants object to the examiner's language to the effect that the unlawful common control was "presumably" continuing, but this referred only to the presumption of continuance, at the time of his decision in June 1957, of unlawful control proven as of 1953–1956. In any event, where, as here, the violation is found to have been effectuated through an intermediary, Kenneth Nelson, and there is no evidence of change of circumstances, the continued control of the acquired carrier by such intermediary is sufficient ground for entry of relief under Section 5(7).

Finally, appellants err in asserting surprise, on the ground that the question of "divestiture" had never been argued or suggested in this case prior to the Commission order of June 9, 1959 (Br. 37–38). Before Division 4, as its report states, the protesting carriers and the Commission's Bureau of Inquiry and Compliance expressly contended that the hearing examiner had erred "in failing to recommend a divestiture in view of the findings that section 5(4) had been and is being violated" (R. 87). The division directed appellants "to terminate the violation" of unlawful control—language which, in other cases, has been understood to mean divestiture, *supra*, p. 56. In their arguments before the full Commission on reconsideration, appellants attacked this order on the grounds it "demands they cease violations of the act which are unknown, unlisted and unspecified." (R. 17). The Commission affirmed "the findings and conclusions" of Division 4, and entered "an appropriate order" (R. 23–24), which expressly stated the means by which the violation was to be terminated and the reach of divestiture, *viz.*, divestiture of interest in the stock of Gilbertville Co. by all appellants including Kenneth Nelson (R. 26). On this record, there is no ground for questioning the Commission's exercise of discretion to apply the usual remedy.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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APPENDIX

National Transportation Policy, 54 Stat. 899 (1940):

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulations of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Interstate Commerce Act § 1(3)(b), as amended, 54 Stat. 899 (1940)

(b) For the purposes of sections 5, 12(1), 20, 204(a)(7), 210, 220, 304(b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons),

such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

Interstate Commerce Act § 5(2), as amended, 54 Stat. 905 (1940), as amended, 63 Stat. 485 (1949)

(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *

* * * * * *

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commis-

sion shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following consider-

ations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Interstate Commerce Act § 5(4), as amended, 54 Stat. 907 (1940)

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

Interstate Commerce Act § 5(5), as amended, 54 Stat. 907 (1940)

(5) For the purposes of this section, but not in anywise limiting the application of the provisions

thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

Interstate Commerce Act § 5(6), as amended, 54 Stat. 908 (1940)

(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

Interstate Commerce Act § 5(7), as amended, 54 Stat. 908 (1940)

(7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitutions for, any other enforcement provisions contained in this part; and with respect to any violation of paragraphs (2) to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to the part shall apply to such a violation by any other person.

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